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In the Supreme Court of the United States

OCTOBER TERM, 1954

No. 133

C. MAXWELL BROWN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The Court of Appeals wrote no opinion. Its *per curiam* order (R. 235-236) affirming the decision of the District Court is reported at 209 F. 2d 266.

JURISDICTION

The judgment of the Court of Appeals was entered December 8, 1953 (R. 235-236), and a petition for rehearing was denied April 20, 1954 (R. 253). On May 11, 1954, by order of Mr. Justice Reed, the

time for filing a petition for certiorari was extended to June 15, 1954. The petition was filed on June 14, 1954. The jurisdiction of this Court is invoked under 28 U. S. C., Section 1254(1). See also Rules 37(b)(2) and 45(a), Federal Rules of Criminal Procedure.

QUESTIONS PRESENTED

1. Whether petitioner's disclosure of certain evidence was the result of deception and coercion on the part of the revenue agents.

2. Whether the Government's net worth computation, which actually did little more than corroborate the proof of specific items of unreported income, sufficiently demonstrated increases in net worth, and whether the pertinent instruction was adequate in the circumstances of this case.

3. Whether the wilful filing of a false income tax return constitutes a wilful attempt to evade and defeat income taxes in violation of Section 145(b) of the Internal Revenue Code.

STATUTE INVOLVED

INTERNAL REVENUE CODE:

SEC. 145. PENALTIES.

(a) [as amended by Section 5(c), Current Tax Payment Act of 1943, c. 120, 57 Stat. 126] *Failure to file returns, submit information, or pay tax.* Any person required under this chapter to pay any estimated tax or tax, or required by law or regulations made under

authority thereof to make a return or declaration, keep any records, or supply any information, for the purposes of the computation, assessment, or collection of any estimated tax or tax imposed by this chapter, who willfully fails to pay such estimated tax or tax, make such return or declaration, keep such records, or supply such information, at the time or times required by law or regulations, shall, in addition to other penalties provided by law, be guilty of a misdemeanor and, upon conviction thereof, be fined not more than $10,000, or imprisoned for not more than one year, or both, together with the costs of prosecution.

(b) *Failure to collect and pay over tax, or attempt to defeat or evade tax.* Any person required under this chapter to collect, account for, and pay over any tax imposed by this chapter, who willfully fails to collect or truthfully account for and pay over such tax, and any person who willfully attempts in any manner to evade or defeat any tax imposed by this chapter or the payment thereof, shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, be fined not more than $10,000, or imprisoned for not more than five years, or both, together with the costs of prosecution.

(c) [as added by Section 136(b), Revenue Act of 1942, c. 619, 56 Stat. 798] Any individual who willfully makes and subscribes a

return which he does not believe to be true and correct as to every material matter, shall be guilty of a felony, and, upon conviction thereof, shall be subject to the penalties prescribed for perjury in section 125 of the Criminal Code.

* * * * * * *

(26 U. S. C., 1952 ed., Sec. 145.)

STATEMENT

Petitioner was indicted in the United States District Court for the Western District of Kentucky, under Section 145(b) of the Internal Revenue Code, for willfully attempting to evade his income taxes for the years 1946 and 1947 by filing fraudulent returns. (R. 4-5.) The amounts of net income and the taxes due thereon, as reported in the returns and as corrected, were alleged to be as follows:

	Reported		Corrected	
	Income	Tax	Income	Tax
Count 1 (1946)	$6,244.51	$858.40	$16,251.93	$4,159.48
Count 2 (1947)	3,037.09	197.05	14,444.96	3,411.76

After a jury trial petitioner was found guilty as charged (R. 12), and on May 4, 1953, he was sentenced to imprisonment for a year and a day and fined $5,000 (R. 3-4.)

Petitioner has been a practicing attorney since 1929. For six years he prosecuted criminal cases as a county attorney and at one time held a card entitling him to practice before the Treasury Department. (R. 37-38.) After the indictment had been returned in this case, a motion was filed to

suppress certain evidence obtained from him by internal revenue agents. It was alleged that when Agent Brumleve first called upon petitioner on January 3, 1950, he asked to see petitioner's records and the contents of his safe deposit box; that petitioner refused, and said that he did not believe the agent had the right to make such a demand and that he desired to consult counsel; that the agent became angry and said he would get a court order directing that he be allowed to make the inspection; and that petitioner then allowed the agent to inspect both the box and the records. (R. 6-8.) There was a hearing on the motion at which Agent Brumleve testified that when he first called on petitioner he explained that he was making a routine check and would like to examine the records and safe deposit box, and that petitioner let him examine the box that day but procrastinated for several days before turning over the records. The agent denied that petitioner had objected or that he had told petitioner that he would get a court order permitting the inspection. (R. 26-33; cf. R. 106-107.) On many essential points the testimony of the agent squarely contradicted the testimony of petitioner. (R. 33-45.) Petitioner admitted that he had consulted another attorney before turning over his records. (R. 40-43.) The court denied the motion. (R. 9-10.)

At the trial, Agent Venable testified that he had examined such records as petitioner made available. Petitioner gave him a list of the legal fees

which he had reported as income for 1946 and 1947. However, the agent investigated the records of third parties and discovered numerous other fees paid to petitioner during these years but not reported. (R. 106-107.) These amounted to $4,059.69 in 1946, and $5,211.66 in 1947. (R. 123-124.) Petitioner admitted receipt of these fees.[1] He testified that he had accepted them from clients under contracts to refund all or part of the fees if he should be unable to see the cases through; that he completed the work on these cases in 1948 and 1949; and that he reported the fees on his returns in those years instead of in the years they were received. (R. 158-159, 163-173.) However, many of the clients with whom these alleged contracts were made appeared as witnesses, and none testified as to any such contract.[2] In fact, their testimony indicated that petitioner had completed the cases and had earned his fees in 1946 and 1947. (R. 59-61, 68, 75-76, 78, 80, 83-84, 86-87, 90-92, 94-100, 102-103, 106, 108-109.) Furthermore, the office files petitioner kept on these cases contained no evidence of any such contingent contracts. (R. 199-203.) It appeared that almost all of these fees had been reported by petitioner in his 1949 return, which was filed several months after he knew he was under investigation. (R. 172-173, 204-205.)

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[1] In fact his figures were larger than the agent's. He admitted receipt of unreported fees amounting to approximately $7,300 in 1946, and $5,700 in 1947. (R. 164.)

[2] With one possible exception concerning a fee of $600. (R. 73-75.)

He was able to produce lists of such contingent fees only for the years 1946 and 1947 (again, these lists were prepared after the investigation had begun), although he testified that he had been following this plan since 1941, and he could not recall what fees he had carried over in this manner in other years. (R. 164, 166-171, 186-190, 192-194.) Finally, he had stated on direct examination that he tried to keep a reserve in his safe deposit box to cover these contingent fees and that this amounted to about $1,500 at the end of 1947 (R. 175-177), but he was unable to give any satisfactory explanation when it was pointed out to him on cross-examination that he had already testified that the total of such fees at the end of 1947 was about $12,000 (R. 206-209).

During the investigation petitioner hired a firm of accountants who prepared a net worth statement based upon all the information petitioner gave them. (R. 145-147, 150-151, 154.) No contingent liability was set up for fees to be returned. (R. 152, 154.) The accountants compared their statement with a similar one prepared by the Government's agents. The items were the same in both and the results were found to be within a few hundred dollars of each other. (R. 120-122, 146-147, 154, 183, 191-192, 215-216.) The accountants' computation showed unreported income of approximately $10,000 in 1946 and $11,600 in 1947. (R. 216.) Petitioner admitted that if the increases

in his net worth were properly computed the money came from legal fees. (R. 192.)

ARGUMENT

1. Petitioner contends (Pet. 8-11, 14-15, 20-24) that he was deceived and coerced into turning over his records and permitting the agents to examine the contents of his safe deposit box, and that the trial court erred, therefore, in denying his motion to suppress evidence. The simple answer is that the testimony of petitioner and Agent Brumleve at the hearing presented issues of fact, and Brumleve's testimony justified a finding that there was neither deception nor coercion.

As to deception, Brumleve testified that he told petitioner at the outset that he was making a routine check and would like to examine his safe deposit box and records; that petitioner made no objection and allowed him to examine the box that day; and that the records were turned over after several days delay. (R. 26-33.) Petitioner testified that, before permitting examination of his records, he believed that the investigation had a criminal aspect (R. 42), and he admitted that he consulted another attorney before allowing the examination (R. 41-43). And there is nothing in the agent's testimony to indicate that he represented to petitioner that his investigation was for civil purposes only.[3] On the evidence, it was proper

[3] Nor is there anything to indicate, as petitioner asserts (Pet. 24), that Brumleve knew he was initiating a criminal prosecution. As a revenue agent, his duties were to make a

to conclude that there was no misrepresentation and that petitioner was fully aware of the possible consequences when he consented to the examination.

As to coercion, Brumleve flatly denied that he had threatened to get a court order. (R. 28.) Here again, the issue was one of fact. Moreover, petitioner's testimony that he was unaware of the constitutional privilege against self-incrimination is patently incredible in view of his six years' experience as a prosecuting attorney. (R. 38-43.) The evidence justified the conclusion that the records were turned over voluntarily and without objection.

2. As the trial court pointed out in its instructions, this is at most only "partially" a so-called net worth case. It is clear from the petition itself (pp. 11, 13, 27-28) that there was proof of substantial specific fees received and unreported by petitioner in the two years covered by the indictment. The central issue at the trial was whether these sums were properly reportable for later years (as petitioner reported them after investigation of his returns had been under way for some months, *supra*, p. 6) or whether they were unlawfully and wilfully omitted from petitioner's returns for the years in which they were received. In the circumstances, petitioner's vague attacks (Pet. 11-12, 15-

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routine check of income tax returns. If he discovered evidence of fraud, he called in a special agent to develop that aspect of the case. Brumleve called Special Agent Venable into the case after his first visit. (R. 127.)

18, 24-28) on the sufficiency of the Government's net worth computation and on the instructions relating to this aspect of the evidence are clearly without substance.

Admitting that he had received and failed to report considerable amounts of legal fees, petitioner claimed that these fees were contingent on his completion of services and only became income in later years following such completion.[4] The evidence contradicting this testimony amply justified the conclusion that the explanation was false. See pp. 6-8, *supra*. What is important here, however, is the fact that the Government's net worth computation simply corroborated that part of the case which petitioner admitted. Petitioner himself points out (Pet. 28) that had his explanation of the unreported fees been credited, it would have followed that he owed no additional taxes for the years in question and could not have been guilty of an unlawful attempt at evasion.[5] The effect of this observation is an acknowledgment of the plain fact that it was the alleged explanation of petitioner's failure to report fees he admittedly received, not the sufficiency of the corroborating net worth state-

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[4] The results of the Government's net worth computation indicated amounts of unreported income somewhat larger than the amount of specific fees proved and admitted. However, petitioner's own accountant had reached practically the same figures in his net worth computation. *Supra*, p. 7.

[5] Petitioner couples this statement, in which we concur, with an assertion that the jury was improperly charged on this point. As we show below (pp. 12-13), there is no basis for his contention that the trial court's instructions omitted the element of intent to evade tax in defining the offense.

ments, which presented the decisive problem for the jury's determination.[6]

As an abstract proposition, the trial court's instruction on the subject of the net worth computation (R. 223-224) may be open to criticism in that it does not clearly point out that the annual increases in net worth must be traceable to taxable income. But there was no objection to this portion of the charge. (R. 228.) And this procedural flaw in petitioner's contentions here reflects the substantive answer already noted—that the adequacy of the net worth analysis made no difference in view of the uncontroverted showing of unreported fees.

3. While they are not altogether clear or clearly distinguished in the petition from the contention discussed in the previous point, petitioner appears to make two further, closely interrelated arguments (Pet. 12-13, 15-16, 18-19, 24, 28-29): First, that the wilful filing of a false return is not sufficient to constitute a wilful attempt to defeat and evade tax in violation of Section 145(b), but could only be charged as a misdemeanor under Section 145(a) (prohibiting *failure* to file returns, etc.) or a felony under Section 145(c) (condemning wilful making of false returns). Second, that the trial court's instructions, permitting a verdict of guilty upon a

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[6] The four cases upon which petitioner relies, in which this Court recently granted certiorari, are clearly distinguishable, for in all of them the Government was forced to rely almost entirely upon the net worth method to prove unreported income. *Friedberg* v. *United States*, No. 18; *United States* v. *Calderon*, No. 25; *Holland* v. *United States*, No. 37; *Smith* v. *United States*, No. 52.

finding that petitioner had wilfully filed a false return, omitted essential elements of the offense. Both contentions are plainly without merit.

As to the first, the recent decision in *United States* v. *Beacon Brass Co.*, 344 U. S. 43, approving a rule consistently followed by the courts of appeals, leaves no doubt that wilfully false statements, whether oral or written, are sufficient to constitute the attempt to evade denounced by Section 145(b). See, *e.g.*, *Gaunt* v. *United States*, 184 F. 2d 284, 288 (C. A. 1), certiorari denied, 340 U. S. 917; *Cave* v. *United States*, 159 F. 2d 464, 466 (C. A. 8), certiorari denied, 331 U. S. 847. The same decision refutes the suggestion that because the wilful filing of a false return may have violated another statute, Section 145(c), it could not also be an offense under Section 145(b). See, also, *United States* v. *Noveck*, 273 U. S. 202, 206; *Gavieres* v. *United States*, 220 U. S. 338.[7]

As for the instructions, petitioner's complaints largely rest upon and fall with the erroneous argument that the wilful filing of a false return was

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[7] Petitioner's reliance upon *Spies* v. *United States*, 317 U.S. 492, is obviously misplaced. The *Spies* case requires, in order to sustain a conviction under Section 145(b), that there be proof of some affirmative action in which the "tax-evasion motive plays any part," where it has been charged that the attempted evasion was committed by means of a wilful *failure* to make a return and *failure* to pay a tax, derelictions which are misdemeanors under Section 145(a). 317 U.S. at 499. But *Beacon Brass* makes it clear that wilfully false statements, the most obvious form of attempted evasion under our system of tax collection, may complete the offense under Section 145 (b).

insufficient to establish his guilt. It may be added, however, that the trial court's instructions clearly required for conviction a finding that petitioner had not only failed to pay the tax that was due and owing, but had also attempted by some positive and affirmative act to evade the tax. The charge amply demonstrated to the jury that they must find an additional tax owing and a conscious and wilful attempt to evade it. (R. 219, 222-223, 224-227, 228.) These instructions, covering in substance the requested charge petitioner quotes (Pet. 12-13) and claims should have been given, afford no basis for attack.[8]

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[8] We note finally the contention (Pet. 29) that there was misconduct on the part of one of the trial jurors. This allegation was denied by the juror (*ibid.*), and the trial court denied a motion for new trial on this ground after consideration of affidavits on both sides (R. 21, 25). There was no outside contact with a juror as in *Remmer* v. *United States*, 347 U.S. 227, and the verdict may not otherwise be impeached by the jurors themselves. *Rakes* v. *United States*, 169 F. 2d 739, 745-746 (C.A. 4).

CONCLUSION

The decision below is correct and presents no question calling for review. The petition for a writ of certiorari should be denied.

Respectfully submitted,

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JULY, 1954.

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